STILL COLONIZING AFTER ALL THESE YEARS

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This paper began life as two lectures, given in Saskatchewan in 2012 while I was holding the Ariel F. Sallows Chair in Human Rights at the University of Saskatchewan.[1] I had been struck by parallels between the contemporary advocates of giving "Indians" fee simple interests in reserve land,[2] and the "enfranchisement" schemes which originated before Confederation, in which male Indians who had attained a certain level of accomplishment would be given interests in reserve land that would eventually ripen into fee simple title and be severed from the reserve; these men would become eligible to vote, and shed their Indian status altogether.[3] The similarity between the older enfranchisement plan and the contemporary scheme to divide reserves into fee simple parcels, suggested to me that the colonial era was not actually over in Canada. I decided to pursue this idea further when it met with interest from my two Saskatchewan audiences.

These explorations of past and present colonizing within the context of the Indian Act and its predecessors broadened to include far more than just the enfranchisement scheme and the modern-day fee simple proposals. It was necessary to set the inquiry against the overall historical background. The

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[1] The first was a public lecture given at the University of Regina on February 29, 2012, under the auspices of the Department of Political Science. The second was the keynote address at the fall continuing legal education seminar of the lawyers of Legal Aid Saskatchewan, September 27, 2012, in Saskatoon.

[2] I deliberately use the term "Indian" here because the proposals for fee simple interests in land relate to land on reserves under the *Indian Act*, RSC 1985, c I-5. For a blueprint of this proposal, see Tom Flanagan, Christopher Alcantara and Andre LeDressay, *Beyond the Indian Act*, McGill-Queens University Press, 2010. ("Flanagan et al.")

[3] First enacted in *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, 20 Vict c 26 (1857). This enfranchisement scheme, in various forms, remained in place until 1985. Enfranchisement was dealt with in sections 109 to 112 of the *Indian Act*, RSC 1970, c I-6. Those sections were all repealed by SC 1985 (1st Supp), c 32, s 20 ("*Bill C-31*"). In 1960, registered Indians living on reserve in Canada became eligible to vote in federal elections by the *Canada Elections Act*, SC 1960, c 39, effectively removing the promise of the franchise as an inducement to individual assimilation through "enfranchisement" schemes. A short-lived variation on the larger enfranchisement scheme was *The Electoral Franchise Act* of Canada, SC 1885, c 40, repealed by *The Franchise Act, 1868,* SC 1898, c 14. Under that plan, which applied east of Manitoba, a male Indian on reserve could vote if he had possession of a separate and distinct parcel of land on the reserve, to which he had made improvements to the value of at least $150. Again, the link between citizenship rights for "Indians" and their assumption of individualized responsibility for plots of reserve land was evident.

government of Canada pursued a staggeringly ambitious program of separating Indigenous peoples from their traditional territories, and acquiring those lands for the Crown. These lands were then either alienated to third parties for settlement, resource development, nation-building, or other government purposes, or retained as "Crown lands". The land acquisitions were accomplished in part through a program of Treaty-making with Indigenous peoples, particularly in Ontario and the west and north-west, but they also involved de facto acquisition or occupation, without going through the formality of making Treaties. Small tracts of land were "reserved" in various ways for Indigenous peoples[4]; whether these lands were reserved under Treaty[5] or not, all of the reserves came to be administered under the federal Indian Act. The Indian Act, in effect, was the repository for the strategies of colonization, and carried them forward to the present day, where their vitality remains unabated. To be clear, I am not contending that we are now living in an era of neocolonialism, or some other post-colonial state, with colonizing machinery that resembles that of the past. Rather, I contend that the process of colonization which began hundreds of years ago is still going on, using the same strategies and many of the same tools developed in past centuries.

I begin this paper with a description of colonization, and in particular, of "internal colonization" which is central to the relations between what is now Canada and the Indigenous peoples who held this land before the arrival of incomers from Europe. I then sketch Canada's historic and continuing efforts to secure possession and control of Indigenous land, whether by way of the historical methods or contemporary processes modelled on them. I link the processes of land acquisition to the Indian Act, and apply the understanding of internal colonization to that statute. In that context, I look at not only in its provisions about reserve lands (affected by both the enfranchisement scheme of yore and modern day proposals for fee simple interests in reserve land), but also the definition of who is an "Indian" under the Act, which has served the colonizer's goal of reducing the

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[4] The Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back,* Vol 1 (Printed from For Seven Generations, published by Libraxus Inc., 1991) ("Commission, Volume 1, part 1") describes some of the ways reserves were created other than by Treaty. The French Crown would grant land for Indian reserves to missionary orders on the theory that the Crown had the right and title to the lands in question (at 109); the first reserve in New France was established in 1637 (at 107). Royal Commission reported that the creation of reserves in the Atlantic region was "as a result of Indians' petitions or their sorry circumstances, rather than the policy of a central authority" (at 109). A few reserves were set aside in New Brunswick by licences of occupation to individual Indians on behalf of themselves and their families or bands, which licences were then confirmed by order-in-council (at 109); In Nova Scotia lands were set aside by order-in-council to be held in trust for individuals (at 109); in Prince Edward Island one reserve was established by a private benefactor and later private land was purchased with government funds in order to create other reserves. (at 109) In pre-Confederation Ontario reserves were created by order-in-council or established by trust agreements with missionary societies (at 118-120).

[5] Reserves created by Treaty before Confederation include those established by the Robinson Huron and Superior Treaties (1850) and the Manitoulin Island Treaty (1862) in Ontario (Commission, Volume 1, part 1, at 118-120) and by 14 land surrender treaties between the governor of the Vancouver Island colony, William Douglas, and the Coast Salish and Lekwammen Nations between 1850 and 1854 (Commission, Volume 1, part 1, at 119 and James (Sa'k'ej) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) at 255).

Indian population. I argue that Canada is still actively practising internal colonization, trying to complete the job which was begun over a century and a half ago. Despite the occasional contemporary public disavowal of its old practices[6], Canada is still colonizing after all these years.[7]

COLONIZATION

The Royal Commission on Aboriginal Peoples (RCAP) comments on the variety of methods used by European powers to expand into the rest of the world.[8] The Commission includes Canada among the four modern-day countries identified by "settler colonialism".[9] These four countries, says the RCAP Report, were "targeted" for settlement, as "safety valves for the rapidly growing populations of European home countries".[10]

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[6] See, for example, Aboriginal Affairs and Northern Development Canada, "Statement of Apology: Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools System" (11 June 2008, Ottawa, Ontario) online: <http://www.aadncaandc.gc.ca/eng/1100100015644/1100100015649>. In its November 12, 2010 statement of support for the United Nations *Declaration on the Rights of Indigenous Peoples,* Canada cited this apology, creation of the Truth and Reconciliation Commission on Indian Residential Schools, the government's apology for relocation of Inuit families to the High Arctic, and the honouring of Metis War Veterans at Juno Beach as examples of a "shift in Canada's relationship with First Nations, Inuit, and Metis People." The statement of endorsement is reproduced in full at "Canada Endorses United Nations Declaration on the Rights of Indigenous Peoples" online: <http://triballink.org/2010/n/canada-endorses-the-united-nations-declaration-on-the-rights>.

[7] I am not alone in explicitly identifying the *Indian Act*, as a contemporary instrument of colonialism. Cannon and Sunseri, for example, declare "we openly name the Indian Act and all other socio-political structures imposed by the Canadian state as imperialist projects" and call its imposition of non-traditional forms of government "a blatant act of colonialism"; Martin J. Cannon & Lina Sunseri, *Racism, Colonialism and Indigeneity in Canada: A Reader* (Don Mills, Ont: Oxford University Press, 2011) xviii. They associate with settler colonialism the Canadian state's treatment of all Indigenous nations as one 'Indian race', and "the imposition of racial hierarchy through Indian status distinctions": xvi and xviii.

[8] Commission, Volume 1 part 1, *supra* note 4, at 105

[9] These four are Canada, New Zealand, Australia, and the United States (Commission, Volume 1 part 1 at 105). Interestingly, these four were the only nations to vote against the *Declaration* at the United Nations General Assembly session on September 13, 2007 when it was accepted 114 to 4 with 11 abstentions. Of these four nations, "Canada has been the most aggressively opposed to the Declaration, rejecting any obligation to implement the Declaration within Canada and campaigning implacably against its implementation in international forums." Alex Neve & Craig Benjamin, "Canada and the U.N. Declaration on the Rights of Indigenous Peoples: Opposition Must Give Way to Implementation" (Fall 2011) 16 *Prairie Forum* 1-8, at 2

[10] Commission, Volume 1 part 1, *supra* note 4 at 105. Bonita Lawrence identifies a prior, and probably overlapping, period of "mercantile colonialism", characterized by massive invasion and competition for markets by Europeans, which destabilized the existing tribal political alliances in eastern America. Bonita Lawrence, "Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada," 21-46 in Sherene H. Razack, *Race, Space and the Law: Unmapping White Settler Society* (Toronto: Between the Lines, 2002) at 26-27. Though she focuses on the eastern seaboard, Lawrence's

The transplanting of Europeans to what became Canada was, at one level, a manifestation of "external colonization": that "salt-water" expansion by which Europeans established themselves in distant places.[11] Europeans created the governmental framework of Canada as an "external" colony, first of France and then of Great Britain, a colony forming part of the extended empire of an imperial European state.[12] Paul Kael emphasizes that the relations between imperial state and colony were Inherently unequal, with the imperial state controlling the sovereignty of the colony.[13] One celebrated narrative of the Canadian state features its evolution from colony to nation, to use Arthur R.M. Lower's evocative phrase[14]. In that story, patriation of the Canadian constitution from the Parliament of the United Kingdom at Westminster in 1982[15] marks Canada's final achievement of full sovereignty as a nation.

Lower's colony to nation narrative of Canada illustrates one of James Tully's crucial points about external colonies. Where the colony and the imperial power are located on different territories, "the colonies can free themselves and form geographically independent societies with exclusive jurisdiction over their

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observation is equally true of the impact of the fur trade and other mercantile activities that penetrated from the east into central and ultimately western Canada, or from the Pacific coast inland.

[11] Paul Kael uses Catherine Irons's terms: external colonization, external colonization by neighbouring states, and internal colonization, stating that "by external colonization is meant so-called 'salt-water' colonization in which aliens colonized distant places." Paul Kael, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (New York: Cambridge University Press, 2003) at 43

[12] The Royal Commission on Aboriginal Peoples pointed out that there were basic differences between the constitutions of the settler colonies created by European powers, which stemmed largely, if not entirely, from explicit grants of power, in the form of royal charters, proclamations, commissions, instructions or Acts of Parliament, supplemented by basic unwritten principles, and the constitutions of Aboriginal nations which "sprang from their own internal arrangements and philosophies and were nourished by their inherent powers as self-governing nations…." Commission, Volume 1, at 91, and see the discussion below about the governments established in new British colonies in the Americas, by means of the *Royal Proclamation of 1763*.

[13] Kael, *op. cit. supra* note 11, at 37-38 and 41, relying on the definition of imperialism fashioned by Benjamin Cohen and of empire created by Michael Doyle.

[14] Arthur R.M. Lower, *Colony to Nation*: *A History of Canada*, 1st ed (Toronto, Longmans, Greene & Company, 1946); 5th ed (Toronto: McClelland and Stewart, 1977). Francis writes that "Lower's desire was to free Canada from its restricting position in the Empire-Commonwealth and thus allow it to reach full maturity as a nation-state – to evolve from colony to nation": R. Douglas Francis, "The Golden Age of Canadian National Historiography" (1977) 6:2 *Acadiensis* 106 at 106-107 and places him in a group of Canadian historians including Frank Underhill and Harold Innis which wanted to "carve out a Canadian 'civilization' in the wilderness", *Ibid* at 116. The "civilization" of Canada through historiography presents a striking parallel to the "civilization" that was sought for Indigenous peoples through the instrumentality if the *Indian Act* and related government policy. The model of civilization in both cases was that of white, colonizing Europe.

[15] *Canada Act, 1982* (UK) (1982, c 11) to which was appended, as Schedule B, the *Constitution Act, 1982*.

own territories…."[16] This is not possible with internal colonization. Tully observes that the "ground of the relationship" between the colonizer and the colonized in an internal colony is "the appropriation of the land, resources and jurisdiction of the indigenous peoples, not only for the sake of resettlement and exploitation (which is also true in external colonization) but for the territorial foundation of the dominant society itself."[17] There is, in this model, no geographical separation between dominant and subordinated, imperial and colonized, to provide a land-based platform from which the colonized can assert or reassert sovereignty.

Interwoven with the narrative of Canada as an evolving, and ultimately fully sovereign, external colony of Europe, then, is the story of internal colonization of the Indigenous peoples on the land mass of what is now Canada. This internal colonization was effected at first by European powers; at Confederation, the Canadian state assumed the dominant role of internal colonizer[18]. So-called "settler colonies", like Canada, are an instance of internal colonialism; such colonies were not primarily established to "extract surplus value from Indigenous labour", but were premised on displacing Indigenous peoples from the land (or replacing them on it).[19]

The RCAP Report describes the complex displacement of Indigenous peoples integral to the process of internal colonization. Indigenous peoples were physically displaced from their traditional territories; they were socially and culturally displaced, as missionary activities and European schools undermined the ability to transmit traditional knowledge and values from one generation to the next and substituted the values of Victorian Europe; and they were politically displaced as colonial laws forced them to abandon or at least disguise traditional governing structures and processes in favour of colonial municipal institutions.[20] RCAP notes

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[16] James Tully, "The Struggles of Indigenous Peoples for and of Freedom," in Duncan Ivison, Paul Patton & Will Saunders, eds, *Political Theory and the Rights of Indigenous Peoples* (New York: Cambridge University Press, 2009) 36-59 at 39.

[17] Tully, *supra* note 16, at 39

[18] *Constitution Act, 1867*, 30 & 31 Vict, c 3, 91(24). See Olive Patricia Dickason & David T. McNab, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 4th ed, (Don Mills, Ont: Oxford University Press, 2009) at 216, at which the authors refer in footnote 9 to John E. Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas*, 1842-1867 (Toronto: University of Toronto Press, 1955) at 223 for his description of the transfer of Indian administration from London to Canada.

[19] Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: the Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999) at 1. Wolfe illustrates his point with reference to the clearing of Native North Americans from their land, and the importation of African slaves to provide labour on that expropriated land: see 1-2. See also Tully, *op. cit. supra* note 16, at 39

[20] Commission, Volume 1, part 1 at 105

that the negotiation of Treaties continued side by side with "the legislated dispossession through the Indian Act"[21]. It states, "From the Crown perspective it seemed clear that these treaties were little more than real estate transactions designed to free Aboriginal lands for settlement and resource development."[22]

Tully describes one of the fundamental contradictions of internal colonization as "the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that indigenous peoples refuse to surrender."[23] He asserts that since the beginning, "the long-term aim of the administrators of the system has been to resolve the contradictions by the complete disappearance of the indigenous problem: that is, the disappearance of the indigenous peoples as free peoples with the rights to their territories and governments."[24] Tully identifies two strategies for bringing that about. One is that the Indigenous peoples could become extinct in fact (by dying out, intermarriage, urbanization) or by extinguishing their will to resist assimilation. The second "and more common" strategy, in Tully's view, is to attempt to extinguish the rights of Indigenous peoples to their territories and self-government." [25]Both of these strategies have been used historically and are used today.

LANDS SURRENDERED AND LAND RESERVED: THE FOUNDATION OF INTERNAL COLONIZATION

The Treaty of Paris, 1763, marked the ascendancy of Great Britain over France in the Americas. Following the signing of the Treaty, King George III issued in 1763 a Royal Proclamation establishing a framework for the governance of Britain's new possessions. The Royal Proclamation created four "distinct and separate Governments", including that of Quebec, the former French colony. The Governors of these new colonies were directed to summon General Assemblies, which, along with the Governors and their Executive Councils, would make "Laws, Statutes, and Ordinances" for their "Public Peace, Welfare, and good Government" "as near as may be agreeable to the Laws of England." The Governors were also given the power to make grants of land to persons in those colonies or coming from other British colonies "upon such Terms…as have been appointed and settled in our other Colonies, and under such other Conditions, as shall appear to us to be necessary and expedient for the Advantage of the Grantees, and the Improvement

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[21] Commission, Volume 1, part 1 at 105-106

[22] Commission, Volume 1, part 1, at 106. And see also 117, 120. These comments are directed at both the Ontario Treaties and the numbered Treaties signed in the former Northwest Territory, west and north of the Manitoba/Ontario border.

[23] Tully, *op. cit. supra* note 16, at 39

[24] Tully, *op. cit. supra* note 16, at 40 (emphasis in original)

[25] Tully, *op. cit. supra* note 16, at 40

and settlement of our said Colonies."[26] This creation of public governments for the colonies, reflecting the Westminster model and exercising limited powers conferred by the Monarch, was not the approach which the Royal Proclamation took to the Crown's Indigenous allies.

The *Royal Proclamation of 1763* expressed the Monarch's view that:

> …it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds…[27]

The *Proclamation* also declared the King's "Royal Will and Pleasure":

> To reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources Of the Rivers which fall into the Sea from the West and North West as aforesaid…[28]

The *Proclamation* forbade "all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained."[29] Moreover, the *Proclamation* also provided that even in the parts of the colonies where the King had thought it appropriate to allow settlement, no private person should purchase land directly from the Indians in any Lands reserved to the Indians. Rather, declared the Proclamation:

> …if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at

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[26] *The Royal Proclamation*, October 7, 1763, as reproduced in Brian A. Crane et al., *First Nations Governance Law*, 2d ed, (LexisNexis, 2008) at Appendix 1, page 327. The quoted passages are found at 327-330.

[27] *Royal Proclamation*, *op. cit. supra* note 26, at 330

[28] *Ibid.*

[29] *Royal Proclamation*, *op. cit. supra* note 26, at 331

> some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony…[30]

The huge land mass affected by the *Proclamation* was occupied by a diverse population of Indigenous nations, with their own languages, cultures, beliefs, and practices. In the *Proclamation*, the single term "Indian" is employed to encompass all of them. The uses to which the various parts of these traditional lands were put varied with the seasons, and the economic, social, and spiritual practices of the peoples inhabiting them. Yet, the *Proclamation* refers solely to "Hunting Grounds". The reduction of a complex web of peoples and societies to a unidimensional "Indian" population, that was to characterize the Indian Act, had already begun with the *Proclamation*.

The *Proclamation* contemplates only two kinds of transactions in land between the Crown and Indigenous peoples. On the one hand is the Indigenous act of selling or ceding land to the Crown. On the other is the Crown's "reservation" of lands to the Indigenous peoples. The *Proclamation* leaves it open for Indigenous peoples to remain in possession of their lands, presumably to govern those lands as they had always done, at least as a matter of constitutional theory. It is that constitutional space which is one of the primary assets of the *Proclamation* as a rights-conferring or protecting instrument. However, the realpolitik of the situation was that pressure from settlers and developers to acquire those vast lands was intense, and the Indigenous peoples were comparatively powerless to resist it. It was, in these circumstances, not unwise to cast the Crown into the role of protector of Indigenous interests.

Yet nothing in the *Proclamation* laid out standards of ethical behaviour for the Crown to follow in its role of protector. Such standards were clearly necessary, because the Crown itself (later the government of Canada) was one of the primary driving forces behind the opening of Canada for settlement and resource development, a role which could, and did, conflict with its role as protector of Indigenous interests. By way of the *Proclamation* the Crown gave itself a monopoly on acquisition of lands from Indigenous peoples, but the *Proclamation* did not enforce, or even recommend, Crown moderation in taking over Indigenous lands, or require that fair market value be paid for these lands. These shortcomings in the *Proclamation*, and the absence of other standards of behaviour for Crown exercise of the monopoly it enjoyed, opened the way for predatory behaviour by the Crown that would be cemented into the administrative and legislative arrangements of the Canadian state by way of the Indian Act. [31]

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[30] *Ibid.*

[31] In *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245, Binnie J. for the Court observes at para 80 that "the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risk of government misconduct or ineptitude." I mention the absence of standards to govern Crown behaviour quite deliberately here, fully aware of the later

Following the issuance of the *Royal Proclamation*, the use of Treaty as a mechanism of land cession by First Nations was first practised extensively in what is now Ontario. In what J.R. Miller calls the "first stage of Upper Canadian Treaty-making"[32] between the Royal Proclamation of 1763 and the beginning of the War of 1812, Great Britain acquired all the land along the Great Lakes and other boundary waters in southern Ontario.[33] In the second stage of treaty-making, between 1815 and 1827, seven treaties with the Crown opened up for settlement and other purposes almost all of the remaining arable land in southern Ontario[34] By 1836, the Crown had acquired access to all of the arable land in Upper Canada south of the Canadian Shield.[35] Treaty-making resumed in 1850, because of the desire to open up the Shield to mining.[36] Under the direction of Treaty Commissioner William B. Robinson, the Robinson Huron and Superior Treaties were concluded in 1850, acquiring very large tracts of territory in west and northern parts of what is now Ontario.[37] The Manitoulin Island Treaty of 1862, granting the western part of that Island to the Crown, was the last pre-Confederation Treaty in Upper Canada.[38] As the sale of their lands progressed, "First Nations were confined to smaller and smaller tracts, typically in areas that were least suited to European settlement, agriculture or resource extraction."[39]

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development in Canadian law of finding such standards in "the honour of the Crown." Historically, and in contemporary Canada, the honour of the Crown has not actually been a reliable inspiration of moral behaviour from the Crown or the Canadian government, although it has been used to support a theoretical obligation for such behaviour.

[32] JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), at 91.

[33] *Op cit supra*, note 32, at 90. There were thirteen treaties in this period, the making of which is described in Miller, *op cit supra*, note 32 at 79-90

[34] JR Miller, *op cit supra* note 32, at 93-95

[35] JR Miller, *op cit supra* note 32, at 109. The largest acquisition was from the Saugeen, who lost much of their 1.5 million acres on first, the southern part, and then the northern part, of the Bruce Peninsula in Ontario, in a treaty of 1836, and later dispossession in 1854. Miller, at 107; Commission, Volume 1, at 118-120, 196-197

[36] JR Miller, *op cit supra* note 32, at 110

[37] JR Miller, *op cit supra* note 32, at 114, 117

[38] JR Miller, *op cit supra*, note 32, at 118, 121. Another "round" of Treaty-making in Ontario occurred in 1923, after it was realized that title to lands around Georgina Island, Rama, Scugog, Curve Lake and Alderville had never been extinguished, and the government obtained land surrenders through the two Williams Treaties. JR Miller, *op. cit. supra*, note 41, at 223-225

[39] Commission, Volume 1, part 1, at 118

At Confederation, legislative authority over "Indians and Lands reserved for Indians" was assigned to the government of Canada by section 91 of the Constitution Act, 1867.[40] The first post-Confederation statute of the government of Canada to deal with Indian lands, passed in 1868, provided that "All lands reserved for Indians or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passage of this Act, but subject to its provisions."[41] The Act also provided that "no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act."[42] Just as the Royal Proclamation of 1763 had set out the conditions for a valid surrender or cession of Indian lands to the Crown[43], the 1868 Act also established conditions for a valid surrender, and stipulated that a surrender could only be made to the Crown.[44] The stage was already being set, in the young nation, for the state's acquisition of what small pieces of land remained to Indigenous peoples (in the form of reserves) after the pre-Confederation round of settlement, land appropriation, and cession by Treaty. Land surrender remains a feature of the Indian Act down to the present day.[45]

The first comprehensive statute dealing with Indian matters was passed by Canada in 1876.[46] The Indian Act, 1876 defined "reserve" as any tract or tracts of land set apart by treaty or otherwise for the use or benefit of, or granted to, a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered.[47] RCAP points out that this legislation was passed in "the midst of the treaty-making process going on in western Canada"[48]. Indeed, Treaties 1 through 7 were concluded between 1871 and 1877[49]; these western numbered Treaties followed closely upon the acquisition of the Hudson's Bay Company territory in Rupert's Land and the North-Western Territory by Great Britain and its

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[40] *The Constitution Act, 1867*, 30 & 31 Victoria, c.3 (UK), s 91 (24).

[41] *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868, c 42, s 6.

[42] *Ibid*.

[43] The *Proclamation* provided that the lands were to be purchased "only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony….". Crane et al. *op cit supra* note 26 at 331.

[44] SC 1868, c 42, ss 8-10.

[45] See "Surrenders and Designations", ss 37-4, ss 37-41, and "Management of Reserves and Surrendered and Designated Lands," ss 53-60 in *Indian Act*, RSC 1985, c I-5.

[46] *An Act to amend and consolidate the laws respecting Indians*, 39 Vict. 1876, c 18 (" *Indian Act, 1876*").

[47] *Indian Act, 1876*, s 6.

[48] Commission, Volume 1, part 2, unit 8, at 66.

[49] JR Miller, *op cit supra* note 32, at 166.

transfer to Canada.[50] Four more numbered Treaties, covering more northerly lands, were made between 1899 and 1921[51]. The numbered Treaties contained formulae for determining how much land would be allocated to the peoples signing or adhering to the Treaty, and thus the size of the "reserves" they would inhabit. Although the definition of "reserve" in the Indian Act, 1876 includes tracts of land set apart by Treaty, RCAP points out that the Act is otherwise silent on the question of the Treaties already made, and those in process when the Act was passed. RCAP comments, "It is almost as if Canada deliberately allowed itself to forget the principal constitutional mechanism by which the nation status of Indian communities is recognized in domestic law."[52] The Manitoba Justice Implementation Commission argues that while Indigenous peoples were negotiating the numbered Treaties under the expectation that they would continue as before to govern their own affairs, the Crown knew that it would be imposing a legislative regime to suppress traditional authority, and did not communicate that knowledge across the table. [53]

There is no specific suite of provisions in the Indian Act dealing with land affected by treaties. There was no administrative structure created in government to ensure that the Treaties were implemented[54] and Treaties were not put into their own specific implementing legislation[55]. Absent any specific provisions to implement the Treaties or administer lands affected by Treaty, the Indian Act became the governing statute, applying in the same fashion to land acquired with or without Treaty. Under the Indian Act regime, the government of Canada exercised virtually total control over Indian lands, including power to lease or sell them[56]. In fact, while the Treaty-making process was still going on, between 1896 and 1911, there were over 100 surrenders of Treaty reserve land under the Indian Act, with 21% of the land which had been so recently reserved by Treaty to the Prairie First

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[50] The acquisition by Britain was by means of the *Rupert's Land Act, 1868* (UK), 31-32 Vict, c 105, and these lands were admitted to Canada by *The Order of Her Majesty in Council Admitting Rupert's Land and North-Western Territory into the Union, 1870* (UK), RSC 1985, Appendix II, No 9, in accordance with s 146 of the *Constitution Act, 1867*. See JR Miller, *op cit supra,* note 32, at 430 and fn 11.

[51] Treaty 8 (1899), Treaty 9 (1905), Treaty 10 (1906) and Treaty 11 (1921), JR Miller, *op cit supra* note 32, at 187

[52] Commission, Volume 1, part 2, unit 8, at 67

[53] Manitoba Aboriginal Justice Implementation Commission, *The Justice System and Aboriginal People*, chapter 5, Aboriginal & Treaty Rights, at page 30, online: <http://www.ajic.mb.ca/volume1/chapter5/html>.

[54] Commission, Volume 1, part 1, at 134.

[55]Commission, Volume 1, part 1, at 134-135

[56] Before land could be leased or sold, it had to be surrendered to the Crown, in accordance with the procedure for surrender set out in the *Indian Act*, a procedure which reflected that set out in the *Royal Proclamation*. See sections 25 to 28 of *Indian Act, 1876*.

Nations being surrendered to the Crown.[57] Some of these surrenders were of dubious morality, not just because the stewardship duties of the Department of Indian Affairs conflicted with the mandate of its alter ego, the Department of the Interior, to open up the west; three Superintendents General or Deputies used their positions for personal gain in the transactions. [58] The sheer number and size of the surrenders have led one commentator to describe this era as "a brief and shameful period in Canadian history."[59]

The *Indian Act, 1876* made clear that reserve lands were held in common. It defined a "band" as any tribe, band or body of Indians who own or are interested in a reserve, or in Indian lands in common, of which the legal title is vested in the Crown.[60] The recognition that reserve lands are held in common continues to the present day[61], and is one of the protections established in the Royal Proclamation of 1763 which endures. However, in the 1876 Act, the Superintendent General of Indian Affairs was given power to order that a reserve be surveyed and divided into lots, and to require that band members obtain "location tickets" for individual plots of land.[62] This creation of individual possessory interests in reserve land was carried over into successive versions of the Indian Act, with the evidence of such interests now being termed certificates of possession.[63]

By conflating Treaty and non-Treaty situations, and administering all "Indian" matters through the *Indian Act*, Canada subjected to the assimilative forces of the Indian Act all of those Nations who had signed or adhered to Treaty expecting a relationship of more equality or mutuality with the Crown. Government hegemony over Indigenous peoples by way of the Indian Act was very different from the purportedly benevolent and protective, but respectful, stance of the Monarch in the *Royal Proclamation of 1763*. The Indian Act reduced all of the Indigenous nations who had once arguably been the Treaty partners of the Crown (and even before that, its military allies), into small polities structured and managed according to a single legislative template that left them with almost no power. Moreover, Nations who had never ceded land in the manner required by the Royal

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[57] Peggy Martin-McGuire, *First Nation Land Surrenders in the Prairies, 1896-1911* (Prepared for the Indian Claims Commission, Ottawa, September 1998) xiii-xvi.

[58] Martin-McGuire, *op cit supra* note 57, at xviii.

[59] Martin-McGuire, *op cit supra* note 57, at xiii.

[60] *Indian Act, 1876*, s 3.1. Emphasis supplied.

[61] The definition of Band in section 2(1)(a) of the *Indian Act*, RSC 1985, c I-5, is that it is a body of Indians for whose use and benefit in common lands, the legal title to which is vested in Her Majesty, have been set apart.

[62] Commission, Volume 1, part 1 at 68.

[63] *Indian Act* RSC 1985, c I-5, ss 20-27. The recording of individual possessory interests in reserve land is done in a central registry in Ottawa, but this registry does not establish priorities or other protections like those found in a modern Torrens land title system, or even a land registry system.

Proclamation of 1763 were similarly swept into the constraining structure of the Indian Act, in spite of claims to continuing sovereignty over their lands. [64]

"OLD FAMILIAR WAYS"[65] STILL A SUPPORT AND COMFORT

Published just after the centennial of Confederation, in 1969, Canada's White Paper on Indian policy[66]provides a snapshot of government thinking not only at that time, but also for the preceding century. The White Paper embraced the goal of promoting "true equality"[67] for Indian people, proposing that the Indian Act should be repealed and legislation passed to permit Indians to control Indian lands (ie reserves) and acquire title to them.[68] Responsibility for Indians would devolve upon the provinces and the federal Department of Indian Affairs would be wound up.[69] The White Paper spoke of Canada's "ultimate aim of removing the specific references to Indians from the constitution" so as to end the legal distinctions between Indians and other Canadians.[70] This is the "civilization" and assimilation of the 1857 Act by another name.

The White Paper acknowledged that "Many of the Indian people…believe that lands have been taken from them in an improper manner, or without adequate compensation, that their funds have been improperly administered, that their treaty rights have been breached."[71] However, Canada asserted that "the terms and effects of the treaties between the Indian people and the Government are widely misunderstood."[72] It continued, "A plain reading of the words used in the treaties

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[64] The Nisga'a never ceased to assert their claim to their traditional lands in northwestern British Columbia. In a Petition to the King in 1913, the Nisga'a Nation asserted that "No part of the said territory has been ceded to or purchased by the Crown." Hamar Foster, Heather Raven & Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Peoples* (Vancouver: UBC Press, 2007), at 243: Appendix B (The Nisga'a Petition of 1913), Article 5. Yet it was necessary to stipulate in the *Nisga'a Final Agreement* that lands owned by the Nisga'a will no longer be reserve lands under the *Indian Act: Nisga'a Final Agreement in Brief*, Appendix II to Tom Molloy, *The World is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House Ltd, 2000) at 220.

[65] In Paul Simon's song, "Still crazy after all these years", from which the title to this paper has been adapted, he says "I seem to lean on old familiar ways". © 1975 words and music by Paul Simon.

[66] Canada, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969). ("*White Paper*")

[67] *White Paper*, at 6.

[68] *White Paper*, at 6, 11-12.

[69] *White Paper*, at 6.

[70] *White Paper*, at 8.

[71] *White Paper*, at 11.

[72] *White Paper*, at 11.

reveals the limited and minimal promises that were included in them."[73] The government argued that the significance of the treaties "has always been limited and will continue to decline" and predicted that "Once Indian lands are securely within Indian control, the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended."[74]

The White Paper did acknowledge the need to explore ways of dealing with claims arising from the performance of the terms of treaties and other agreements, and the administration of monies and lands under legislation relating to Indians. In addition to these "specific claims", Canada also recognized that some of the land which had been promised under certain of the numbered Treaties had still not been allocated.[75] With respect to "aboriginal claims to land", however, the White Paper states that "these are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community."[76]

The White Paper was widely criticized[77] and withdrawn in 1970. Shortly after that, in 1973, the Supreme Court of Canada decision in Calder[78]made the government reassess its rejection of Indian rights to land.[79] In Calder, the Court recognized that the Indigenous interest in their ancestral lands constituted a legal interest that predated European settlement.[80] After Calder, the government of Canada acknowledged not just the specific claims arising from previous administration of treaty or statute, and treaty land entitlement claims under the numbered treaties [81] but also what came to be known as comprehensive claims,[82] involving claims to land and, often, governance rights.

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[73] *White Paper*, at 11.

[74] Both quoted passages are from *White Paper*, at 11.

[75] *White Paper* at 11.

[76] *White Paper* at 11.

[77] Two of the strongest critiques of the *White Paper* were "A Presentation by the Indian Chiefs of Alberta to the Right Honourable P.E. Trudeau, Prime Minister and the Government of Canada", *Citizens Plus*, June 1970, ("the Red Paper"), and Union of B.C. Indian Chiefs, *A Declaration of Indian Rights: The B.C. Indian Position Paper*, Vancouver, BC, November 17, 1970, ("the Brown Paper").

[78] *Calder v Attorney General of British Columbia*, [1973] SCR 113.

[79] This view is taken from *R v Sparrow*, [1990] 1 SCR 1075 at para 50.

[80] Binnie J. in *Mitchell v Canada (MNR*), [2001] 1 SCR 911 at para 67 and *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at para 75.

[81] A treaty land entitlement claim arises when a First Nation asserts that the government did not provide all of the reserve land promised in a Treaty. Once the government is satisfied that the First Nation has a valid claim, a settlement is negotiated and set out in a treaty land entitlement agreement. Most of the TLE claims relate to land in Manitoba and Saskatchewan. Auditor-General of Canada, *2009 March*

The publication of the White Paper in 1969 effectively derailed the work then underway to establish a body to deal in a systematic way with specific claims arising from government administration under Treaty or statute[83], which had been recommended in July 1947 by the Special Joint Committee of the Senate and House of Commons. [84] It was not until 2008 that Canada put in place an independent claims tribunal that could make binding adjudications on specific claims.[85] Until the 1960s, these claims were handled through the regular administrative processes of the government, and occasionally by reference to an outside third party.[86] Daniel concludes that "while it was sometimes recognized by government that administrative decisions on claims were not always adequate politically, there was not, apparently, any recognition that such decisions were frequently neither just nor efficient….".[87] He comments that administrative solutions "assume that the Crown is capable of determining where its responsibilities lie…"[88] From 1969 to 2008, the government appointed Claims Commissioners under the Public Inquiries Act, who could investigate and make recommendations but not make any binding determination.[89]

Status Report, ch 4, Treaty Land Obligations online: <http://www.oag-bvg.gc.ca-internet/English/parl_oag_200903_04_3_32291.html> ("*Auditor-General Report*"). Although the White Paper recognized 1n 1969 that Canada had outstanding obligations, implementing a solution would take almost fifty years. The volume of land at issue was large. In the 1992 *Saskatchewan Treaty Land Entitlement Framework Agreement*, and 8 other individual agreements, $415 million was provided to 33 First Nations to allow them to acquire up to 2.7 million acres of land. The 1997 *Manitoba Treaty Land Entitlement Agreement* and 8 other individual agreements made available up to 1.4 million additional acres of reserve lands. Additional agreements were later signed. In addition to the delay between the *White Paper* date of 1969 and the signing of the framework agreements in the 1990s, there has also been delay in implementing the agreements, including a processing time of from 5 to 7 years to convert to reserve status the land that is chosen by the First Nations. *Auditor-General Report*, at 4-8

[82] Comprehensive land claims are those based on the assertion of continuing Aboriginal rights and claims to land that have not been dealt with by treaty or other means; they are based on claims of unextinguished Aboriginal title.

[83] Richard C Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Prepared for Research Branch, Department of Indian and Northern Affairs, February 1980) at 217 ("Daniel").

[84] Indian and Northern Affairs Canada, *Specific Claims: Justice at Last; History of Calls for and Efforts to Create an Independent Tribunal on Specific Claims,* nd (one leaf flyer forming part of the government's package distributed with the new legislation in 2007).

[85] *The Specific Claims Tribunal Act*, SC 2008, c 22.

[86] Daniel, at 208.

[87] Daniel at 208.

[88] Daniel at 210.

[89] The first such Commissioner was Lloyd Barber appointed in December 1969. James Morrison, "Archives and Native Claims," (1979-1980) 9 *Archivaria* 15. The Indian Specific Claims Commission began in 1991, conducting investigations and providing mediation services. Like Professor Barber, the Commission operated under the federal *Inquiries Act*. From 1994, it called upon the government to

The ad hoc approach to dealing with specific claims resulted in "both chronic inefficiency and instances of continuing glaring injustice.[90] Government had been aware since the end of World War II that there was a backlog of claims[91]. In 2007, it was reported that there were more than 1,300 claims filed against Canada, and Professor Michael Coyle of the University of Western Ontario made a somewhat conservative estimate that at the current rate, it would take 50 years for the federal government to resolve the claims already filed.[92] The desperately slow pace of addressing some of these claims is evident. The Caldwell First Nation, whose traditional lands included Point Pelee on the Lake Erie shore in Ontario, pressed claims from the 1830s, seeking benefits provided for under a 1790 Treaty, and land at Point Pelee promised to them for their military assistance to the British in the War of 1812. It was not until 2010 that they received a settlement.[93] Claims were submitted in 1986, and settled in 2010, by the Fort William First Nation and the Mississaugas of the New Credit.[94] The process for each claim took 24 years. More striking is the fact that the Fort William claim arose from faulty land surveys conducted in 1853 to implement the 1850 Robinson Superior Treaty, and the Mississauga Claim arose from the exploitative terms of an 1805 surrender to the British of 251,000 acres of land in what is now Toronto.[95]

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create an independent permanent body to expedite the resolution of specific claims. Chief Commissioner's Message, Indian Claims Commission, Treasury Board Secretariat, 2008 online: <http://www.tbs-sct.gc.ca/rpp/2008-2009/(inst/icc/icc01-eng.asp>.

[90] Olive Patricia Dickason & David T McNab, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 4th ed (Don Mills, Ont: Oxford University Press, 2009) at 446.

[91] Daniel at 216.

[92] John Miner, "Powder Keg", *London Free Press*, February 19, 2007, University of Western Ontario permalink, online: <http://www.law.uwo.ca/News/February_07/19.02.07_Coyle.html>. Dickason's figures are even more discouraging. Although she cites (*op. cit. supra* note 90 at 443) estimates that there are more than 1,000 unresolved specific claims on the books at the time her book was prepared (a smaller number than Coyle), she refers at 446 to estimates by the Assembly of First Nations that at the current pace of settling claims (an average of about 13 years) it would take about 130 years to resolve all claims.

[93] Indian and Northern Affairs Canada, Fact Sheet: Caldwell First Nation Specific Claim, October 2006 (modified 2008-10-30), online: <http://www.ainc.inac.gc.ca/ai/mr/nr/s-d2006/02788bk-eng.asp> and Carys Mills, "First Nation accepts $105M land-claim settlement," *Postmedia News*, August 22, 2010, online: <http://www.montrealgazette.com/First+Nation+band +accepts=105M+land+claim+settlem >.

[94] "Fort William settles claim after 160 years," *Anishnabek News*, Vol 22, Issue 10 (Reprinted with permission from the *Thunder Bay Chronical-Journal* newspaper) at 1; Mississaugas of the New Credit First Nation, Toronto Purchase *Specific Claim: Arriving at an Agreement* (nd); Mike Adler, "Toronto Council, Mississaugas of the New Credit Celebrate land claim settlement," *Inside Toronto*, June 10, 2010, online: <http://www.insidetoronto.com/news-story/52346-toronto-council-mississaugas-of-the-new-credit-celebrate-land-claim-settlement>.

[95] *Loc cit supra* note 94.

Specific claims reflect Indigenous peoples' attempts to get redress for the continuing injustices of historical acts of colonization. They involve instances where First Nations were shortchanged on the implementation of Treaty promises, where their entitlements were taken from them through sharp dealing, or where decades of government resistance and foot-dragging prevented resolution of Indigenous peoples' legitimate expectations. Through the Specific Claims process, and its specialized counterpart, the Treaty Land Entitlement process, First Nations try to secure the performance of Treaties they entered into many decades, or even centuries, before, or promises given long ago, or try to reverse the effect of maladministration or corruption. There is a sad track record of such abuses. The Co-Chair of RCAP, Rene Dussault, has pointed out that Indigenous communities today have less than one-third the land base accorded to them by the written terms of their historic Treaties, because Treaty allocations were not made, or allocated land was later expropriated or sold for highways, railways, hydro lines, the St. Lawrence Seaway, and cities.[96] Canada's refusal to deal, honourably --- or, indeed, at all --- with these important claims, has brought its relations with Indigenous peoples into profound crisis on more than one occasion.

For over two centuries, the Mohawks of Kanesetake repeatedly laid claim to lands holding deep historical and sacred significance to them, which had been granted by King Louis XV of France to the seminary of St. Sulpice. Their claims were rebuffed in numerous forums from 1781 onwards. In contemporary times, Canada failed to respond to their request in 1961 to make the land a reserve, rejected a comprehensive claim to the land filed in 1975, and in 1986 rejected a specific claim which had been filed in 1977. In 1990, the town of Oka Quebec proposed to expand its golf course into sites sacred to the Mohawks, and a standoff of several months ensued. One Quebec Provincial Police Officer was killed, and the Canadian Army was mobilized to break up the blockade. In the aftermath of this crisis, in 1991, Canada established the Royal Commission on Aboriginal Peoples, which rendered its report in 1996. To date, more than twenty years after its establishment, the recommendations of the Royal Commission remain in limbo. [97]

In September 1995, unarmed peaceful protesters from Stoney Point First Nation occupied Ipperwash Provincial Park in Ontario; protester Dudley George, shot by the Ontario Provincial Police during that occupation, was the first Indigenous person to be killed in a land rights dispute since the nineteenth

[96] Rene Dussault and George Erasmus, Address for the launch of the report of the Royal Commission on Aboriginal Peoples," Aboriginal Affairs and Northern Development Canada (last modified 2010-09-15) at 5, online: <http://www.aadncaandc.gc.ca/eng/1100100014639/ 1100100014640>.

[97] This abbreviated account is drawn from Dickason, *op cit supra* note 90, at 319-324.

century.[98] A Commission of Inquiry finally called 8 years later to investigate the shooting and its background reported on a long and sorry record of government abuse of the land rights of the Kettle Point and Stoney Point peoples. By the Huron Tract Treaty of 1827, the Kettle Point and Stoney Point peoples ceded over two million acres of land, keeping less than 1% of that area as reserves, but pressure for additional surrenders continued. In 1927 part of the Kettle Point beach-front on Lake Huron was surrendered, followed in 1928 by the surrender of all of the Stoney Point beachfront. Canada sold this land, at three times its purchase price, to Ontario, which established a provincial park in 1936, leaving a sacred burial site on the land unprotected.[99] Both the Ontario Court of Appeal, and the Ipperwash Inquiry found "an odour of moral failure" in the Crown's dealings with the First Nations over these surrenders.[100]

In 1942, the Department of National Defence appropriated the entire Stoney Point Reserve under the War Measures Act, overriding the wishes of the Kettle Point and Stoney Point peoples, and not following the land surrender procedures in either the Indian Act or the Royal Proclamation.[101] National Defence promised to return the land after the war, if it was no longer needed for military purposes, but still had possession of it when the Report of the Ipperwash Inquiry was released in 2007, long after its military utility had expired.[102] The Inquiry concludes, "Unfortunately, the issues that were at the heart of the Ipperwash occupation remain unresolved by the federal government to this day. This inexcusable delay and long neglect, by successive federal governments, are at the heart of the Ipperwash story."[103]

Since Canada recognized in 1973 the right to bring comprehensive claims, comprehensive land claims agreements have been negotiated and signed between claimant First Nations, Canada and provincial or territorial authorities. A 2009 report by Canada listed 21 such agreements which had been ratified, covering 40% of Canada's land mass. According to that report, outstanding claims cover approximately 20% of Canada. In contrast to the huge land mass involved in these outstanding entitlement issues, the numbers of Indigenous peoples are relatively small. The 21 completed agreements involved over 91 communities with over

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[98] The Honourable Sidney B Linden, Commissioner, *Report of the Ipperwash Inquiry* (*"Ipperwash*") (Queen's Printer for Ontario, 2007), Vol 1: Investigation and Findings, at 671.

[99] *Ipperwash*, at 673, 685.

[100] *Ipperwash*, at 673, 685.

[101] *Ipperwash*, at 673.

[102] *Ipperwash*, at 673. However, the government of Ontario announced in December of 2007 that it would return Ipperwash Park to the Chippewas of Kettle and Stoney Point. Dickason, *op cit supra* note 90, at 443.

[103] *Ipperwash*, at 685. These two claims resulted in Commissions of Inquiry, but they are by no means the only long-standing cases of injustice perpetrated by Canada against First Peoples.

70,000 members, while the work in progress at the time of the 2009 report involved approximately 270 communities with approximately 200,000 members.[104] A 2012 report states that as of September 2012, there were 93 active self-government and comprehensive land claims negotiation tables across the country.[105]

Even if the Indigenous peoples involved work collectively, it is clear that the bargaining strength of any particular community or group on the one hand, and Canada on the other, cannot possibly be commensurate. Human resource issues, as well as monetary resource issues, weigh heavily on small communities. Moreover, while often lengthy negotiations are under way, the communities must deal with all of the business of daily life, and often with pressure from resource exploration companies seeking to exploit the riches of the territories under discussion. One is reminded of the circumstances confronting First Nations during the negotiation of the first round of land surrender Treaties, from 1763 onwards: the pressure of would-be settlers and developers, and the dwindling vigour of traditional ways of providing a living, placed the First Nations under a comparative disadvantage at the bargaining table.

One of the main prizes for government of modern comprehensive land agreements is the surrender of First Nation title to their traditional lands. This is one of the reasons that Indigenous scholar and activist Russ Diabo refers to the modern treaty process as the government's "First Nations Termination Plan."[106] Extinguishment of Aboriginal title, now as in the first round of treaty negotiations, is in keeping with the goals of the internal colonizer. Even in the context of specific claims based on historical Treaties, one is still dealing with extinguishment issues; the modern First Nation is trying to realize, today, the terms of the historical bargain for surrender or extinguishment that was never fulfilled or was otherwise undermined by government action.

One can rightly ask, then, whether there is anything in the legal system now to protect Indigenous interests that was not available in the past, and if so, how

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[104] Indian and Northern Affairs Canada, *Impact Evaluation of Comprehensive Land Claim Agreements,* February 17, 2009, at 5-6.

[105] Aboriginal Affairs and Northern Development Canada, *Fact Sheet: Comprehensive Land Claims*, September 2012, at 1, online: <http://www.aadncandc.gc.ca/eng/1100100016296/ 1100100016297>. A chart describing these 93 tables is at Aboriginal Affairs and Northern Development Canada, *Negotiation Tables* (date modified 2012-03-19), online: <http://www.aadnc-aandc.gc.ca/eng/1346782327802/1346782485058>.

[106] Russell Diabo, "Harper Launches Major First Nations Termination Plan as Negotiating Tables Legitimize Canada's Colonialism," *The Bullet*, Socialist Project E-Bulletin No 756, January 10, 2012 <http://www.socialistproject.ca/bullet/756.php>.

effective might these measures be. The most obvious new elements are the guarantees of rights in the Constitution Act, 1982. Enforcement of those guarantees through the courts is time-consuming and expensive, however, and at the end of the day, the Court will itself be looking to continued negotiation between the Crown and First Nations as the ultimate solution.[107] In such circumstances, how government behaves, and the extent of its commitment to reaching honourable settlements with Indigenous peoples, are key. Chief Justice Lamer in Delgamuukw states that the Crown is under a moral if not a legal duty to enter into and conduct those negotiations in good faith[108].

In the administration of both the old and the new Treaties, and of the Indian Act, and in its other relations with Indigenous peoples, Canada is now – at least in theory -- subject to high standards of behaviour articulated by the Supreme Court. The core of these standards is the honour of the Crown, a principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.[109] The Court traces the application of this principle in Indigenous law to the Royal Proclamation of 1763, [110] and states that its ultimate purpose is the reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty.[111]

In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*[112], the majority of the Court states that the honour of the Crown arises from the Crown's assertion of sovereignty over an Indigenous people and the de facto control of land and resources that were formerly in the control of that people.[113] The honour of the Crown recognizes the impact of the superimposition of European laws and customs on pre-existing Indigenous societies, which were "here first" and never conquered, but nonetheless made subject to a legal system which they did not share. The historical treaties were framed in that unfamiliar legal system and negotiated and

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[107] In *R v Sparrow,* [1990] 1 SCR 1075, the Court found it significant that after *Calder* the federal government for the first time expressed a willingness to negotiate claims of Aboriginal title, and they went on to say that section 35(1) of the *Constitution Act, 1982* "provides a solid base upon which subsequent negotiations can take place." Paras 51, 53. In *Delgamuukw v BC,* [1997] 3 SCR 1010 at para 186 Chief Justice Lamer alludes to these comments, and expresses the wish that instead of proceeding to the retrial granted by the Court, the parties in *Delgamuukw* will enter into negotiations at which all with potential interests in the land can be represented.

[108] At para 186.

[109] *Manitoba Metis Federation Inc v Canada (Attorney General),* 2012 SCC 14, at para 65 ("Manitoba Metis").

[110] *Manitoba Metis* para 66.

[111] *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511 at para 20 and Metis para 66.

[112] *Loc cit* note 109.

[113] *Manitoba Metis*, at para 66 citations omitted.

drafted in a foreign language.[114] The majority states, "The honour of the Crown characterizes the 'special relationship' that arises out of this colonial practice",[115] and specifically adopts the following passage from Professor Brian Slattery:

> …when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.[116]

The honour of the Crown has been applied by the Supreme Court in several situations, with the caution that it gives rise to different duties in different circumstances.[117] Treaties will be interpreted generously and enforced in a way that upholds the honour of the Crown.[118] Interpretation of statutes as well as Treaties must be approached in a manner which maintains the integrity of the Crown; it is always assumed that the Crown intends to fulfil its promises, and no appearance of "sharp dealing" will be sanctioned.[119] The Crown must act in a way that accomplishes the intended purpose of Treaty and statutory grants.[120] Negotiation of Treaties, similarly, is to be conducted in accordance with the honour of the Crown.[121]The honour of the Crown informs the purposive interpretation of section 35 of the Constitution Act, 1982[122]; the way in which a legislative objective is to be attained must uphold the honour of the Crown.[123] The government's duty to consult with Indigenous peoples and accommodate their interests when the Crown contemplates an action that will affect a claimed but as yet unproven interest is also grounded in the honour of the Crown.[124]

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[114] *Manitoba Metis*, para 67 (quote marks and specific references to the cases cited in this paragraph have been omitted).

[115] *Manitoba* Metis, para 67, cite omitted.

[116] "Aboriginal Rights and the Honour of the Crown," (2005) 29 SCLR (2d) 433, at 436, quoted in *Manitoba Metis* at para 67.

[117] *Haida*, para 18.

[118] Binnie J. in *Mitchell v Canada (MNR),* [2001] SCR 911 at para 138.

[119] *R v Badger*, [1996] 1 SCR 771, at para 41.

[120] *Manitoba Metis*, at para 73 (4).

[121] *Haida*, at para 20; *Manitoba Metis*, at para 73 (3).

[122] *Manitoba Metis*, at para 73 (1).

[123] *Badger*, at para 78, quoting *Sparrow* at page 1110.

[124] *Haida*, para 16; *Manitoba Metis*, para 73 (2).

One particular application of the honour of the Crown was first established in the Guerin[125] case, decided in 1984.. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty, which requires that the Crown act in the groups' best interests in exercising its discretionary control.[126] In Guerin, Canada was acting to secure a lease of reserve land which had been surrendered to it for that purpose, and accepted a lease on terms that were unfavourable to the Band, and contrary to what it had authorized. The Court found that a "sui generis" fiduciary relationship existed between Canada and the Band, in law; until this "watershed decision", courts had characterized any trust relationship between the Crown and a Band as a political trust only, not enforceable in court.[127] The source of the fiduciary relationship in Guerin was found in the Band's aboriginal title to its land, inalienable except upon surrender to the Crown, a feature common to both the Royal Proclamation and the Indian Act. While identifying the relationship as a fiduciary one, however, the Court makes clear that not all of the obligations arising between the parties to a fiduciary relationship are themselves fiduciary in nature, saying that the Crown's fiduciary duty towards Indigenous peoples varies with the nature and importance of the interest sought to be protected.[128]

In Sparrow, the Court states that Guerin grounds a general guiding principle for section 35 of the Constitution Act, 1982: the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples, in a relationship that is trust-like rather than adversarial[129]. Reading section 91(24) of the Constitution Act, 1867 with section 35, interpreted this way, means that "federal power must be reconciled with federal duty".[130]

The most recent decision of the Supreme Court to consider and apply the principle of honour of the Crown is Manitoba Metis. The Court granted a declaration that the federal government failed to implement in accordance with the honour of the Crown the land grant provision set out in section 31 of the Manitoba Act, 1870 , providing for timely allocation of 1.4 million acres of land to the children of Metis in Manitoba at confederation.[131] It holds that the honour of the Crown is engaged by an explicit obligation to an Indigenous group that is enshrined in the constitution[132], and in that situation, the honour of the Crown requires that it take a broad purposive approach to the interpretation of the promise, and act

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[125] *Guerin v Canada*, [1984] 2 SCR 335.

[126] *Haida*, para 18 and *Manitoba Metis* para 73 (1).

[127] *Wewaykum*, at para 73.

[128] *Guerin*, at paras 83, 86.

[129] *Sparrow*, at para 59.

[130] *Sparrow*, at para 62; *Manitoba Metis* at 69.

[131] *Manitoba Metis*, para 154.

[132] *Manitoba Metis* para 70.

diligently to fulfil it.[133] While acknowledging that "implementation, in the way of human affairs, may be imperfect", the Court states that "..a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling the promise."[134]

Although the events giving rise to the obligation, and the claim, took place over a hundred years before, the Court refuses to hold that the claim is barred under provincial limitations acts. Characterizing the issue as a constitutional grievance, the Court states that:

> So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s.35 of the Charter and underlying s.31 of the Manitoba Act, remains unachieved. The ongoing rift in the national fabric that s.31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Metis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, …cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see Reference re Secession of Quebec, [1998] 2 SCR 217, at para. 72[135]

So, too, the Court rejects Canada's argument that the claim is barred by the doctrine of laches. It holds that the required element of acquiescence in Canada's conduct is not present: "In the context of this case – including the historical injustices suffered by the Metis, the imbalance of power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants – delay by itself cannot be interpreted as…acquiescence or waiver."[136]

These doctrinal developments relating to the honour of the Crown sound encouraging. However, they leave me deeply cynical and discouraged. Under our constitution, the Crown is an arm of government, and the powers and duties of the Crown do not vary with the personality or inclinations of any particular monarchical incumbent. Canada was a monarchy, with limited responsible

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[133] *Manitoba Metis* para 75.

[134] *Manitoba Metis*, para 82. The Court also refers to the Crown's repeated mistakes and inaction that persisted for more than a decade (para 128) and persistent inattention (para 110).

[135] *Manitoba Metis*, at 140.

[136] *Manitoba Metis*, at 147.

government and limited autonomy, before it became an independent modern state. The doctrine upon which the Court's modern honour of the Crown jurisprudence is based is old doctrine. In Mikesew Cree, Binnie J. notes that the honour of the Crown was first referred to as a treaty obligation by Gwynne J. of the Supreme Court of Canada in 1895[137]. While it is beyond the reach of this paper to document all of the instances where the Crown's behaviour fell below the standards now being articulated by the Supreme Court of Canada, the record verifies that these were numerous, and include contemporary examples as well as historical ones.[138] The policy expressed in the White Paper, of disdain for important Treaty obligations, manifests how badly the honour of the Crown was wanting in its dealings with obligations under Treaties it had signed to open Ontario, the prairies and the northwest for settlement and development.

There remains much land acquisition business underway in Canada; the modern land claims agreements affect about 60% of our land mass. What assurances can we have that the modern Crown, even with the clear instructions from the Supreme Court of Canada, will behave appreciably better than the Crown of past decades? And if the Crown in right of Canada and the provinces does not

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[137] *Mikesew Cree First Nation v Canada (Minister of Canadian Heritage),* [2005] 3 SCR 388, at para 51, citing *Province of Ontario v Dominion of Canada* (1895), 25 SCR 434 at pages 511-12. Although he acknowledges that Gwynne J. was dissenting in the result, Binnie J. states "nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfillment of its obligations to the Indians." *Mikesew*, at para 51.

[138] In addition to the examples already provided, see *Whitefish Lake Band of Indians v Attorney General of Canada*, 2007 ONCA at 744, at paras 1, 2, 9, 14-21. The Whitefish Lake Band, a signatory to the Robinson Huron Treaty in 1850, surrendered timber rights on its reserve to the Crown in 1886. The Crown sold these rights to a Conservative member of the provincial legislature, under value, and the licence was then flipped twice for successively higher prices. The Crown kept renewing the licences until the timber was virtually exhausted. There was considerable political furor at the time about the "swindle" of the Indians. However, it was not until 2005, a week before the trial of an action for damages brought by Whitefish, that the Crown admitted to breaching its fiduciary duty in 1886 by failing to obtain fair value for the timber licence. Whitefish still had to proceed to trial, and to appeal, before eventually overcoming the Crown's argument for a very low valuation to be placed on the licence. In *Joseph et al v Her Majesty the Queen in Right of Canada (Ministry of Indian Affairs and Northern Development)* 2008 FC 574, the Hagwilget Indian Band enjoyed a natural salmon fishery caused by a rock fall on the river where it had made its home for generations (though only made a reserve in 1938). In 1959, over the objection of the Hagwilget, the federal Department of Fisheries blasted the rock in the canyon, destroying the fishery. The government did nothing to provide compensation for the destruction, and the Hagwilget started litigation in 1985. In 1997, the Hagwilget accepted to enter the specific claims process, but were told in 2001 that the claim could not be resolved in anything less than 20 years, and so they revived their action. The Crown tried unsuccessfully to have the claim struck, and then persuaded the Hagwilget to enter into negotiations in 2006, although the Crown had no negotiating mandate. Having exhausted its resources and gone deeply into debt, the Hagwilget Band applied successfully to the Federal Court for an order of advance costs so that it could continue its litigation. The Court stated that the Crown's behaviour raised serious questions about the honour of the Crown; "for over 25 years the plaintiffs were continuously put off by a series of unkept and broken promises that the situation would somehow be remedied" (at 21), then they were "sidetracked" into the special claims process (at 21), and then the Crown tried to get them to negotiate, an "extraordinary" move given that the Crown is "nowhere near to giving proper instructions and a mandate to counsel to enter into meaningful negotiations." (at 23).

behave in accordance with these standards, what recourse is available to the comparatively small and powerless First Nations that must deal with Canada and a province or territory in modern negotiations? How can a First Nation or group of First Nations not only deal with the negotiation or specific claims process but also respond to third party, primarily corporate, initiatives to claim and develop land to which the First Nation has a historic claim? The transaction costs of the negotiations or litigation that would be necessary to enforce the Crown's duty of honourable behaviour are huge, and can easily exhaust resources that would otherwise be spent on the basics of daily life, like housing, health and education. Even if litigation is successful, like the Manitoba Metis case, or Delgamuukw, the reward for success is the opportunity to spend more time at the negotiation tables, at a pace determined in some considerable measure by Canada. Recently, for example, Canada has announced that it will concentrate on negotiations that are the "most productive", leaving the less productive negotiations to languish;[139] that message, as well as Canada's overall yearly budget for land settlements, has a profound impact on the negotiating process.

The Court's anxiety about the past conduct of the Crown is evident in its jurisprudence on the honour of the Crown. The Court emphasizes that honourable behaviour is necessary in order to promote reconciliation of Crown sovereignty with the prior occupation (and in some cases it even says prior sovereignty) of the Indigenous peoples. The Court knows that dishonourable behaviour by the Crown, at least in theory, tarnishes its exercise of the sovereignty it claims. While it did not achieve this sovereignty by conquest, dishonourable behaviour is the behaviour of a conqueror not an erstwhile ally. I believe that the Court is right about the moral jeopardy into which dishonourable behaviour puts Crown and indeed Canadian sovereignty over Indigenous lands and peoples. Dishonourable Crown behaviour confirms Indigenous resistance to the assertion of Crown sovereignty, and eventually it will bring non-Indigenous people, in great numbers, to resist dishonourable acts done by the government as their representative. It is only if, and when, the government itself begins to appreciate that moral jeopardy, and believe that it is important to prevent it, that we will see honourable conduct from the Crown on a consistent basis, as a matter of government priority.

Meanwhile, the Crown in its modern dress will continue to work towards completion of one element of its agenda of internal colonization, namely securing the surrender to it of Indigenous lands, and extinguishment of Indigenous title. The conditions of that work, for both Crown and Indigenous peoples, will be little different from what they were during the first round of Treaty making which ended

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[139] Aboriginal Affairs and Northern Development Canada, *Result-Based Approach to Treaty and Self-Government Negotiations*, online: <http://www.aadnc-aandc.gc.ca/eng/1346437606032/1346437640078>.

in 1923. This is because there is almost no practical way, short of a transformative vision on the part of the Crown, to get it to behave on a regular basis with the kind of honour contemplated by the case law.

INTERNAL COLONIZATION WRIT SMALL: LAND UNDER THE INDIAN ACT AND THE DEFINITION OF INDIAN

Canada's imposition of the Indian Act, without regard to the underlying constitutional imperatives affecting the relationship of Indigenous peoples with the state, has resulted in a permanent, and continuing exposure of Indigenous peoples to the oppressions of internal colonialism. The Indian Act not only facilitates the continuing erosion of the small interests in land still held by those subject to it. It is a device for gradually reducing the numbers of those whom the government is prepared to recognize as "Indian". In the end, even if there remain "lands reserved for Indians" there may well be no "Indians" eligible to inhabit them.

The enfranchisement scheme started in 1857 highlights several aspects of colonial policy towards Indigenous peoples which are still with us, embedded in the Indian Act. One of the most enduring is the use of legislation to define who is an Indian. Before the 1857 legislation, reference to "Indians" in legislation was very broad and seemed to reflect Indigenous practice[140]. With the introduction of enfranchisement, with its notion that one could become non-Indian by having certain attainments, it became necessary to define the starting point of this transformation, that is, who was an Indian.[141] The connection between being defined as an Indian and having an interest in land on reserve was also foundational to the enfranchisement scheme, and this link would continue to characterize the Indian Act. In the White Paper, Canada states that as long as the Crown controls the land for the benefit of the bands who use and occupy it, the Crown is responsible for determining who may, as a member of a band, share that band land.[142]

Another dimension of the Indian definition established in the enfranchisement scheme was the primacy given to the male. Enfranchisement was only available to male Indians; only their attainments were scrutinized, and only they received fee simple title if successfully enfranchised. When her husband was enfranchised, however, a woman would also lose her Indian status, as would the couple's children, but neither the wife nor the children would take any interest in

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[140] See, for example, *An act for the better protection of the Lands and Property of the Indians in Lower Canada*, S Prov C 1850, c 42 (10th August 1850), discussed below.

[141] JR Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev ed ("*Skyscrapers*") (Toronto: University of Toronto Press, 1989) at 111, describes this as a paradox: first define who the non-citizens are, and then define how to become a citizen.

[142] *White Paper*, at 12.

land. This exclusive focus on the male Indian for purposes of determining the Indian-ness of his wife and children would continue until 1985.

Not surprisingly, voluntary enfranchisement was never a success. The Chiefs of Canada West had made it clear in 1846 that they did not want provisions that would allow conversion of band lands held in common to individual fee simple parcels,[143] and Indians protested against the 1857 Act itself.[144] Only one Indian enfranchised between 1857 and the first Indian Act in 1876[145]. Between 1857 and 1920 only 250 individuals enfranchised.[146]
The failure of voluntary enfranchisement provoked legislation in 1920 to make it compulsory.[147] The involuntary provision was repealed by a new government in 1922 [148], then restored in 1933, finally to be removed in 1951.[149] After 1951, very few Indians chose to be enfranchised[150]. There were 228 voluntary enfranchisements of men and women between 1965 and 1975[151] and only 11 voluntary adult enfranchisements from 1973 to 1976.[152] In 1960, registered Indians living on reserves had finally been given the vote in federal elections,[153] and so it is unlikely that those enfranchising after that date were doing it to get the vote.

The impact on reserve lands of enfranchisement was never seriously tested because of the unpopularity of the measure. Experience with the General Allocation Act (Dawes Act) in effect in the United States from 1887 to 1934 clearly suggests, however, that the success of enfranchisement in Canada would have reduced the overall acreage of land available to reserves[154]. The Dawes Act provided for fee simple interests in reserve land and Flanagan observes that the

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[143] *Skyscrapers*, at 112.

[144] *Skyscrapers*, at 113.

[145] *Skyscrapers*, at 113.

[146] *Skyscrapers*, at 190.

[147] *Op cit supra*, note 32, at 233.

[148] *Op cit supra*, note 32, at 234.

[149] *Op cit supra*, note 32, at 238.

[150] Kathleen Jamieson, *Indian Women and the Law: Citizens Minus* (Canadian Advisory Council on the Status of Women; Indian Rights for Indian Women, April 1978), ("*Jamieson*") at 63.

[151] *Jamieson*, at 63.

[152] *Jamieson*, 64.

[153] *Op cit supra* note 3.

[154] Flanagan et al, *op cit supra* note 2, at 42-52.

"main real-world effects" of 67 years of that legislation was to reduce the size of Indian reservations by half.[155]

Experience in the Canadian prairies with the issuance of land scrip, "a type of promissory note for land"[156], also suggests that individual interests in reserve land would have proven more vulnerable than land held collectively. Between the negotiation of Treaty 1 and the signing of Treaty 11, the government of Canada carried out thirteen "scrip commissions" that issued to Metis people land and money scrip amounting to $2,888,157 in the currency of the day.[157] These scrip commissions were issuing scrip as a way of extinguishing any claims to land title which the Prairie Metis might have had, and the land scrip could be traded in for land. However, Miller observes of this process, "as far as the Metis were concerned they had little to show for the effort."[158] In Saskatchewan, scrip buyers, often representing banks, followed the Treaty Commissioners and offered cash at a discounted rate in exchange for scrip that was signed over to them.[159] "The land that scrip was supposed to represent rarely ended up in Metis hands and they did not assemble a land base of any sort."[160]

At confederation, Canada pledged 1.4 million acres of land to be allocated to the children of Metis then living in Manitoba, to give them a head start on becoming established in the face of the looming influx of settlers competing for land. Long delays in allocating the land meant that "many Metis sold potential interests for too little"[161], with the price for land after it had been allocated being twice what could be gained from selling the entitlement only.[162] Some children, left out of the land allocation process, received scrip only, which was sold for cash on the open market and received about ½ of its face value.[163] In Metis, the Supreme Court found that government behaviour contrary to the honour of the Crown contributed to the disadvantage experienced by the Metis. In any scheme to divide reserve holdings into individual fee simple parcels, government is bound to be involved, and history has shown that it is imprudent simply to assume, or trust, that government will adhere to high standards of behaviour.

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[155] Flanagan et al, at 51.

[156] *Op cit supra* note 32 at 193.

[157] *Op cit supra* note 32 at 227.

[158] *Ibid*.

[159] *Op cit supra* note 32 at 206.

[160] *Op cit supra* note 32 at 207.

[161] *Manitoba Metis*, at para 110.

[162] *Manitoba Metis,* at para 116.

[163] *Manitoba Metis*, at para 118.

The desire to establish individualized fee simple interests in reserve land surfaced again in the White Paper, as a way of giving Indians the same rights and treatment in law as other Canadians. The Red Paper issued by the Alberta chiefs rejected the sameness as equality argument, declaring that "equality in fact may involve the necessity of different treatment."[164] The Chiefs also challenged Canada's argument that individualized fee simple interests were necessary to unlock the economic potential of reserve lands. Canada had argued that government ownership of Indian reserves blocked their beneficial economic exploitation. The Red Paper argued that the government does not "own" Indian reserves, but merely holds them in trust for the bands which are their beneficial owners.[165] It also stated that the government wrongly assumes that Indians can control their land only if they take ownership the way ordinary property is owned.[166] The chiefs contended that the Indian Act could, instead, be changed to give Indians control of their lands without changing the fact that the land is being held in trust.[167] As far as I have been able to determine, there never has been a satisfactory rejoinder to the simple basic point that the Indian Act could be changed to unlock economic potential of reserve land without going all the way to individualized fee simple title.

The Red Paper's arguments work just as well against the contemporary advocates of the First Nations Property Ownership Act.[168] The unwillingness to explore thoroughly what means might be developed to foster commerce on reserve land without giving up its collective character suggests to me that proponents of the fee simple option are not necessarily interested in the collective wellbeing of the First Nation, or even the welfare of the individual holder of fee simple. Rather, these proponents seem to be fixing on fee simple title because it is a bedrock of modern financing, and thus meshes easily with the established practices of the commercial interests which command their real loyalty and attention. The proponents of fee simple seem to want to make the capital value of reserve land (and resources) available to third parties seeking to exploit the land for commercial benefit, without making them invest in innovative and perhaps riskier methods of taking security for monies advanced. The fee simple option may also appeal to the state itself, not just because of its interest in business and resource development, but because revenues from the use or disposal of fee simple land interests are easier

[164] *Red Paper*, at 5.

[165] *Red Paper*, at 9.

[166] *Red Paper* at 10.

[167] *Red Paper*, at 10.

[168] *Flanagan et al,* at 29.

to find and tax than revenue from some more collective deployment of assets might be.[169]

The First Nations Property Ownership Act has not collected, so far, a strong enough following to ensure its passage.[170] This does not mean that Canada has lacked other means of disposing of interests in reserve land, to the benefit of third parties or the Crown itself. Surrenders, sales, leases, and other means have been in the Indian Act repertoire from the outset. Indigenous peoples have learned the hard way that sorrow and loss for them, and financial profit for white colonizers, has been the result of engagement with the "dynamic market economy"[171] . For now, without fee simple interests in land as yet another tool of exploitation, it is on the tried and true ways of reducing the size of reserve land that Canada's colonizing efforts must continue to rely.

However, one final colonizing strategy remains to be considered. We will find that it is still a robust means of internal colonization, because of its usefulness in making Indians disappear, even without giving them any land at all to take away with them.

"INDIANS" DEFINED, AND DEFINED AWAY

James Tully identifies making Indians extinct in fact as one of the strategies of internal colonialism; a related one is to weaken their resistance to being assimilated. Tully's formulation recalls to mind the well-known statement of Duncan Campbell Scott, Deputy Minister of Indian Affairs, in 1920, when he explained to Parliament why he wanted to make enfranchisement compulsory:

> I want to get rid of the Indian problem….Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question and no Indian department and that is the whole object of this Bill. [172]

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[169] It has also been suggested that government likes the fee simple option because it would be easier to overcome individual owners' resistance to an unpopular project like the Northern Gateway Pipeline than to overcome the collective resistance of First Nations: Editorial, "Property rights not a priority," *The Saskatoon Star-Phoenix*, August 11, 2012, at A 10.

[170] *Ibid.*

[171] Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queens University Press, 2000) at 131.

[172] Evidence of Duncan Campbell Scott before the Committee of the House of Commons considering "Bill 14", later enacted as *An Act to amend the Indian Act*, chapter 26, 12-13 George V (assented to June 28, 1922). Quoted in E Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986) at 50, fn 55.

While actual death and extinction did play a role in the reduction of Indigenous populations in Canada[173], an arguably larger role was played by a form of "desk murder"[174]: being defined out of existence by Indian department bureaucrats and Canadian legislators. While arguing that a definition of "Indian" was necessary in order to identify those entitled to access Indian lands[175], the Canadian government constructed the term very narrowly, and in accordance with its own, not Indigenous, concepts of kinship.

The number of claimants to "Indian" status (that debased version of Indigeneity which was all that Canada was prepared to recognize) was accordingly much smaller than it might have been if Indigenous peoples had been able to use their own definitions, or even if the definitions first used by colonial governments had persisted. The goal of Indian policy well into the twentieth century was to assimilate, or "civilize" the Indians; presumably, anyone whose Indian-ness was legislatively "defined away" could be considered "civilized" and thus became a statistic on the plus side of the assimilation ledger.

The original colonial definition of "Indian" was a fairly broad one. Lower Canadian legislation in 1850, for example, had four categories of "Indians": (1) all persons of Indian blood (not further defined or specified as to "quantum") reputed to belong to the particular Body or Tribe of Indians interested in the lands at issue, and their descendants; (2) all persons intermarried with any such Indians and residing amongst them (including men intermarried with Indigenous women), and all descendants of such persons; (3) all persons residing among such Indians, whose parents on either side (fathers and mothers) were or are Indians of such Body or Tribe, or entitled to be considered as such; and (4) all persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians and their descendants.[176]

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[173] Bonita Lawrence, *op cit supra* note 10 at 34-35.

[174] The term was used by Israeli Attorney General Gideon Hausner, the Chief Prosecutor of Adolf Eichmann at his trial, to describe the activities of Eichmann and other bureaucrats of the Nazi Holocaust, who issued from their offices the orders for rounding up, transportation, and other activities that resulted in the slaughter of European Jewry in the death camps. David Cesarini, *Becoming Eichmann: Rethinking the Life, Crimes and Trial of a "Desk Murderer"* (Cambridge: DaCapo Press, 2006) at 3, 6.

[175] An argument still being made as late as 1969 in the *White Paper*.

[176] *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S Prov C 1850, c 42 (10th August 1850), s V. *An Act for the protection of the Indians in Upper Canada from imposition, and the property owned or enjoyed by them from trespass and injury*, S Prov C 1850, c 74 (10th August 1850) simply referred to Indians and those intermarried with Indians (s X).

This definition was restricted quite substantially the next year[177]. By 1876, when the first comprehensive Indian Act in post-Confederation Canada was passed, the term Indian was narrowly defined as (1) any male person of Indian blood reputed to belong to a particular band; (2) any child of such person; and (3) any woman who is or was lawfully married to such person.[178]
Until 1985[179], eligibility to be considered an "Indian" for purposes of the Indian Act[180] descended through the male line, even though matrilineal descent and matrifocal family and kinship structures were a feature of many Indigenous nations. Under this system a child would derive Indian status from his or her father[181]. A status Indian woman who was unmarried could pass status to her child, only if it could not be established that the father of the child was a non-Indian.[182]

A man could confer Indian status on his non-Indian wife. However, from 1869 to 1985, a woman would lose her entitlement to registration if she married a non-Indian male.[183] With no Indian father to bestow it, the children of such unions would be ineligible for Indian status. There are no statistics to show how many women and children were affected by these provisions, but I have noted elsewhere that over 110,000 persons who had lost status this way regained eligibility for registration under Bill C-31, passed in 1985.[184]

Until the *Indian Act* of 1951, a woman who married a non-Indian man might not be totally excluded from her community. If she did not opt to accept "commutation" of her interest in Band funds (which entailed a lump sum

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[177] *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada*, S Prov C 1851, (30th August 1851), s II. The amendment dropped the category of infants adopted by the Indians, and restricted the acquisition of Indian status by marriage to women "lawfully married" to Indians, excluding altogether the husbands of Indian women.

[178] *The Indian Act, 1876*, s 3(3).

[179] *Bill C-31*, *op cit supra* note 3.

[180] Which I call "Indian status" here, in keeping with relatively common usage, although this is not a term used in the *Indian Act*

[181] *In Martin v Chapman*, [1983] 1 SCR 365, a male born out of wedlock to a status Indian father and non-Indian mother was permitted to be registered under s 11(1)(c) of the *Indian Act* because he was a male person who is a direct descendant of a male status Indian. The fact that he was "illegitimate" did not prevent his registration. However, a female child in the same circumstances would not be registered.

[182] For the last version of the legislation before its change in 1985, see *Indian Act*, SC 1951, c 29, s 11.

[183] The most infamous version of this provision, which had existed since 1876, is the one found in section 12(1)(b) of the *Indian Act*, SC 1951, c 29. It was this section that faced the legal challenges which eventually led to the repeal of this provision.

[184] See Mary Eberts, "McIvor: Justice Delayed – Again," (2010) 9:1 *Indigenous Law J* 15-46, at 21-22 and note 25.

payment),[185] she might still remain on the Band list, and if her Band had signed a treaty, she would remain eligible for treaty rights. Some Indian agents would issue "red ticket" identity cards to such women, identifying them as Indian for purposes of some Band benefits and treaty money.[186] However, this loophole was closed in the l951 legislation, which provided that a woman who married a non-Indian could be involuntarily enfranchised by order-in-council.[187] The woman's minor children would be enfranchised with her, even if her non-Indian husband was not their father.[188] In 1956, the "red ticket" loophole was also closed, and women were required to accept a lump sum payment and deprived of their remaining ties with their Band.[189]

Women who were compulsorily enfranchised for marrying a non-Indian formed by far the largest cadre of Indians who experienced enfranchisement. In 1965 to 1975, just over 5000 women and children were involuntarily enfranchised[190], and from 1973 to 1976 when the practice was ended administratively, there were 1,335 involuntary adult enfranchisements.[191] Enfranchisment did not bring these adults the right to vote in Canadian elections; they had already received it in 1960. It did not earn them the fee simple interest in reserve land which voluntary enfranchisement brought to male Indians, but only ensured their complete exile from their home communities. As non-Indians, they were now forbidden by the *Indian Act*[192] from even coming onto the reserve, let alone living there. Yet, this compulsory enfranchisement was, in some ways, the consummate act of colonizing: the women and children were removed from the Indian register, and thus no longer part of the Indian problem so decried by Duncan Campbell Scott. They had been assimilated, dare I say "civilized", not gradually but at the stroke of a pen.

This highly discriminatory treatment of women under the Indian Act became a focus of Indigenous women's activism in the 1970s, through

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[185] *Jamieson*, at 62.

[186] *Jamieson,* at 61.

[187] *Indian Act*, SC 1951, c 149, s 109(1)(2), KJ 91.

[188] *Jamieson*, at 91. This enfranchisement of the children continued until a legislative amendment in 1956: SC l956, c 40, s 26.

[189] *Jamieson*, at 62; SC 1956, c 40, s 6(5).

[190] *Jamieson* gives the number as 5,035 at 63.

[191] *Jamieson,* at 64. The practice did not end by statute until passage of *Bill C-31*. See *supra* note 3.

[192] Because reserves were lands set aside for the use and benefit of Indians, a non-Indian could not come on a reserve, and might be charged with trespass if she did. See the original provision in SC 1876, c 18, s 11.

organizations like Indian Rights for Indian Women and the Native Women's Association of Canada. Two high-profile Court cases challenged the provisions which deprived a woman of Indian status upon marriage to a non-Indian. The first of these, brought by Ojibway Jeannette Lavell and Mohawk Yvonne Bedard of Ontario under the equality before the law guarantee of the Canadian Bill of Rights, was unsuccessful in the Supreme Court of Canada.[193] Sandra Lovelace, a Maliseet woman from New Brunswick, took the issue to the United Nations Human Rights Committee and secured a ruling that the provision violated the UN Covenant on Civil and Political Rights.[194] The equality guarantees of the Canadian Charter of Rights and Freedoms, entrenched in the constitution in 1982, were scheduled to come into effect in 1985.[195] The pressure of the Lovelace ruling, and the coming into force of the equality guarantees, produced amendments to the Indian Act in the form of Bill C-31[196], a term which is still used colloquially to describe this package of legislative changes.

Bill C-31 provided for the reinstatement to Indian status of women who had been deprived of status by reason of their marriage to non-Indian men, and also cancelled the "enfranchisement" of these women where it had been forced on them. It also provided that their children could be returned to status. However, these welcome changes were set in an overall legislative framework that deprived them of their full force. Bill C-31 provided that henceforth, a child would be registered as an Indian only if both of her parents were Indian. This two-parent requirement for status was not the only policy choice available: the government could have continued the system which required only one parent to be a status Indian, but made it possible for both the mother and the father to convey status. Instead, it replaced the privilege of the male parent with a requirement that both parents be Indian in order to convey status. This choice made it more difficult to secure Indian status, and would contribute to a lessening of the status Indian population in the not-so-distant future.[197]

Under the 1985 legislation, a child could derive status from one Indian parent, but that concession would only happen once in a line of descent. A child who had herself derived status from one Indian parent could not, as a single parent, pass that status along. This provision, known colloquially as "the second generation cut-off" was particularly hard on the children of women who had lost status for

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[193] *AG Canada v Lavell; Bedard v Isaac et al*, [1974] SCR 1349.

[194] *Lovelace v Canada*, Communication No R 6/24, UN Doc Supp No 40 (A/36/40) (1981) (UN Human Rights Committee).

[195] Section 32(3) of *Constitution Act, 1982*, being Schedule B to *Canada Act, 1982*, 1982, c 11 (UK).

[196] *Supra*, note 3.

[197] See Megan Furi & Jill Wherrett, Indian Status and Band Membership Issues (Ottawa: Library of Parliament, Parliamentary Information and Research Service, BP-410E, February 1966 (rev. Feb. 2003), cited in Eberts, op. cit. supra note 184, footnotes 23 and 131.

marrying out. Those children could not pass their status on to their own children unless the other parent of those children was also a status Indian.

Sharon McIvor, of the Lower Nicola Band of British Columbia, and her son Jacob Grismer, challenged the preference for male parents in the pre-1985 Indian Act, winning a partial victory.[198] Although the trial court had been prepared to find unconstitutional the whole history of the Act's preference for the male parent, the Court of Appeal chose a much narrower ground for its finding, based on a legislative peculiarity called the "double mother" rule. Under the old Act, for a short period of time, a person would lose Indian status at 21 if both his mother and his grandmother had been non-status women who had gained status by marrying a status male. The BC Court of Appeal considered this to be discrimination against the child of a woman who lost status by marrying –out, as that child had been deprived of status right away, and the child with the "double mothers" had had one additional generation of opportunity to secure status.

Following this convoluted, and highly unpopular, ruling by the BC Court of Appeal, the government of Canada responded with a small legislative amendment. [199] It permitted the grandchildren of women restored to status by Bill C-31 to be registered as Indians with only one Indian parent. The "second generation cutoff" was, in effect, dropped down one more generation for those children. It is estimated that up to 45,000 children could benefit from this amendment.[200]

The two-parent rule installed by Bill C-31 has had another substantially negative effect on the ability of persons to be registered as Indians. The government interprets the two-parent rule to require that the identities of both a child's parents be known, and their Indian status confirmed, before it will register

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[198] *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 and 2007 BCSC 1712, reversed in part by *McIvor v. Canada (Registrar of Indian and Northern Affairs)* 2009 BCCA 153, leave to appeal to SCC denied 11.05.2009 SCC Case Information Docket 33201, 2009.11.05 online: Supreme Court of Canada, <http://www.scc-cs.cgc.ca>. Supplementary Reasons of BCCA (Extension of Suspension of Declaration of Invalidity), 2009 BCCA 153 (April 1, 2010). Sharon McIvor and her son Jacob Grismer have now taken proceedings before the UN Human Rights Committee: *Sharon McIvor and Jacob Grismer v Canada*, Communication Submitted for Consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights, September 24, 2010; Canada replied on August 22, 2011, and McIvor and Grismer responded on December 5, 2011 in Communication No 2020/2010.

[199] *An act to promote gender equality in Indian registration*, SC 2010, c 18 (in force January 31, 2011).

[200] Department of Indian Affairs and Northern Development, *Estimate of Demographic Implications from Indian Registration Amendment, McIvor v Canada* (March 10, 2010), <http://www.ainc-inac.gc.ca/eng/1100100032515>.

the child under the two-parent rule. This administrative rule puts a premium on the father's good will and co-operation; where he is abusive, unknown or absent, or does not want to incur a support obligation, or the child has been born of rape, infidelity or incest it may be difficult or impossible to put his name forward with the child's application for registration. Sometimes, the absence of his name from the registration particulars could be just the result of an inability to navigate the department's paperwork. Without the father's registration particulars, a single woman will be able to register her child only under s. 6(2). A mother who is, herself, the child of only one status Indian parent and thus registered under s.6(2), may be unable to secure Indian status for her child at all. The "second generation cut-off" stands in the way. Under the pre-1985 legislation, a single woman could secure Indian status for her child as long as no one came forward to establish that the father was not a status Indian. Without Indian status, it may be impossible for the child to live on reserve, or, if allowed on reserve, to access benefits like education or health care. This application of the two-parent rule represents a tightening of the previous rules for registration of children whose only known parent is a status Indian mother.[201]

The two-parent rule, like its predecessor barring women from conveying status, are government rules that have been applied to limit and reduce the population of registered Indians in Canada. These rules are not consistent with the kinship practices of many Indigenous peoples; children who would be accepted as members by a First Nation could well be excluded by the statutory rules. If a First Nation choses to have its own membership code, which is an option under the Indian Act, Canada will not provide any per capita funding to that Nation for anyone who is not considered a registered Indian under Canada's rules. There is, in other words, a fiscal punishment for inclusiveness.

In the long term, if a First Nation ceases to consist of Indians who are registrable or registered under Canada's rules, it will cease to be entitled to its reserve, and the reserve will revert to the Crown.[202] What Canada could not accomplish by enfranchisement, namely the reabsorption of Indian reserves, it is still trying to accomplish by means of the desk murder of registered "Indians". Narrow the definition to the vanishing point, and First Nations' claims under the Indian Act to the only piece of territory left to them after the first great sweep of internal colonization will also be gone.

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[201] See Michelle M Mann, *Indian Registration: Unrecognized and Unstated Paternity* (Ottawa, Status of Women Canada, June 2005), executive summary v-vii.

[202] The Act defines Indians as those registered under the Act, and provides that reserves are for the use and benefit of Indians.

CONCLUSION

I have tried to demonstrate here that colonization is not a feature of Canada's past, but continues with vigour in the present day. While we now have explicit constitutional protections of Indigenous rights, and specific instructions from the Supreme Court of Canada that the Crown must behave with honour towards Indigenous peoples, enforcing these obligations is extremely difficult in practice. What is really required is that Canada renounce its colonizing ways, and embrace a new approach of partnership and true reconciliation with Indigenous peoples. I believe that one way of signalling such a change is for Canada to accept unreservedly the provisions of the UN Declaration on the Rights of Indigenous Peoples and to act in accordance with it, in both its policies and its administrative practices. Canada has refused to give that ungrudging endorsement up to now, characterizing the Declaration as aspirational, and non-binding[203]because of its concerns that the Declaration gives Indigenous peoples too much power[204]. The degree of power given in the Declaration is only a problem to a state that remains determined to pursue its old agenda of internal colonization. Two hundred and fifty years after the issuance of the Royal Proclamation of 1763, it is not too early to signal the end of Canada's colonial era.

[203] Statement of Canada*, op cit supra*, note 6.

[204] Neve and Benjamin, *op cit supra* note 9, identify the Declaration's several requirements of the full, prior and informed consent of Indigenous peoples to proposed government action as the source of Canada's concern about the instrument.